

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-100607
	:	TRIAL NO. B-1000125-B
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
NAQUEZ MITCHELL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Naquez Mitchell was indicted for aggravated robbery with a firearm specification, robbery, and having a weapon while under a disability. Following a jury trial, Mitchell was found guilty of robbery and sentenced to five years' incarceration. The jury was unable to reach a verdict on the other charges, and they were dismissed. Mitchell has appealed.

Mitchell's first, second and third assignments of error allege that the trial court erred in overruling his Crim.R. 29 motion for acquittal, and that his conviction was based upon insufficient evidence and was against the manifest weight of the evidence.

To determine whether the trial court properly overruled Mitchell's Crim.R. 29 motion for acquittal, this court applies the same test as it would in reviewing a

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1

challenge based on the sufficiency of the evidence.² In reviewing the sufficiency of the evidence, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”³ To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.⁴

The victim testified that Mitchell and two other men pushed him up against a wall. The victim stated that one of the men hit him in the head three or four times. Mitchell struck the victim in the head with a gun, breaking his glasses. Mitchell then pulled the victim’s coat up over his head. The men took a \$100 bill from the victim and ran away.

Two of the victim’s friends had been walking a distance ahead. They both testified that they saw at least one punch thrown at the victim. They also stated that they at first thought that Mitchell was just wrestling with the victim.

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.⁵ The jury was in the best position to judge the credibility of the witnesses. Following a review of the record, we hold that the evidence was such that reasonable minds could have reached different conclusions as to whether each element of robbery had been proved beyond a reasonable doubt.

² See *State v. Love*, 1st Dist. No. C-100597, 2011-Ohio-2053, ¶6; *State v. Jordan*, 167 Ohio App.3d 157, 2006-Ohio-2759, 854 N.E.2d 520, ¶49.

³ *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

⁴ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

⁵ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

Further, we cannot say that the jury clearly lost its way in finding Mitchell guilty of robbery. The first, second and third assignments of error are overruled.

Mitchell's fourth assignment of error, alleging that the trial court abused its discretion in imposing the five-year sentence, is overruled. The sentence was not contrary to law.⁶ It was within the range provided by statute, and the trial court complied with the sentencing laws in imposing it.⁷ We hold that the sentence imposed by the trial court was not so arbitrary, unreasonable, or unconscionable as to constitute an abuse of discretion.⁸

Mitchell's fifth assignment of error alleges that he was denied the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Mitchell must show that his trial counsel's performance was deficient and that the deficient performance was so prejudicial that he was denied a reliable and fundamentally fair proceeding.⁹ To show that he has been prejudiced, Mitchell must "prove that there exists a reasonable probability that, were it not for counsel's errors, the result" of the proceeding "would have been different."¹⁰

Mitchell argues that his counsel was ineffective in failing to move for a mistrial after a police officer stated that drugs were found near Mitchell at the time of his arrest. Mitchell's counsel objected to the officer's testimony. The trial court gave a curative instruction, instructing the jury that they were to disregard any reference to drugs in its entirety. After reviewing the record, we hold that Mitchell has not shown that his counsel violated an essential duty that resulted in prejudice to him. The fifth assignment of error is overruled.

⁶ See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124; *State v. Ridley*, 1st Dist. No. C-100301, 2011-Ohio-2477, ¶80.

⁷ Id.

⁸ See *State v. Jackson*, 1st Dist. No. C-090414, 2010-Ohio-4312, ¶30, discretionary appeal not allowed 127 Ohio St.3d 1486, 2010-Ohio-6371, 939 N.E.2d 184.

⁹ See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

¹⁰ See *State v. Bradley*, *supra*.

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The judgment of the trial court is affirmed. Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 31, 2011

per order of the Court _____.
Presiding Judge